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No. 93-5209

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

DARREN J. CUSTIS,

Petitioner,

v.

UNITED STATES

Respondent.

On Writ Of Certiorari To The United States Court of Appeals For The Fourth Circuit

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INTEREST OF AMICI CURIAE

Amici States obtain thousands of criminal convictions each year, and must defend those convictions on direct appeal, in post-conviction relief actions, and later in one or more habeas corpus proceedings. These convictions are the result of extensive and careful work done by police officers, prosecutors, and other personnel. The States' central interests in protecting the public and securing redress and justice for the victims of crime depend upon an orderly process that assures the finality of its criminal convictions. Except where constitutional requirements for due process are implicated, a constitutional challenge to a predicate state conviction during federal sentencing proceedings violates the principles of comity and federalism and is contrary to the presumption of regularity that attaches to final judgments.

Allowing collateral challenges to predicate state convictions impermissibly requires the States to passively witness attacks on their final judgments despite the full faith and credit that otherwise is owed those judgments. The attacks will take place in federal courts that are removed in time and place from the actual convictions. The federal courts and federal prosecutors may not even notify the States prior to a ruling upon the convictions. In the alternative, the States may feel themselves obligated to defend such convictions, thereby bearing the considerable burden of activity to ensure that their judgments are upheld. This burden may well consist of providing extensive documentation, finding witnesses, and advising and participating in hearings.

If a state judgment is judged invalid in a federal sentencing process, the State predictably will bear the burden of defending actions brought by the defendant in habeas corpus, post-conviction relief, or parole revocation hearings based upon the federal court's ruling that the underlying conviction was invalid. The defendant also may bring suit in wrongful imprisonment and on other related civil claims. Even if many of these suits ultimately are unsuccessful, the inevitable costs of defending them will impose additional and significant burdens on the State.

QUESTION PRESENTED

WHETHER THE UNITED STATES CONSTITUTION REQUIRES A DISTRICT JUDGE TO HOLD A HEARING ON A CONSTITUTIONAL CHALLENGE TO A PREDICATE STATE CONVICTION USED FOR ENHANCEMENT OF A FEDERAL SENTENCE IN CASES IN WHICH THE ALLEGED CONSTITUTIONAL CHALLENGE IS NOT ONE FOR WHICH "PREJUDICE" IS PRESUMED TO EXIST.

SUMMARY OF ARGUMENT

In *Burgett v. Texas*, 389 U.S. 109 (1967) and *United States v. Tucker*, 404 U.S. 443 (1972), the Court expounded on a constitutionally mandated exception to the traditional rule that a prior conviction can be considered for the purpose of an enhanced punishment. The reason for such exception is that a uncounseled conviction undermines the very integrity of the factfinding process and thus makes consideration of that conviction in the sentencing process inherently unreliable. Such a limited exception, however, does not require that all merely alleged claims of constitutional violation must be considered and rejected by a federal sentencing judge before a final state conviction may be considered for enhancement purposes.

While prejudice may be presumed to exist from an outright denial of counsel, the same prejudice is not presumed to exist from many other allegations of constitutional error.

The Fourth Circuit's holding in this case properly balances the defendant's right to reliable sentencing and a state's important interests in the finality of its convictions. It is appropriate to limit challenges to final state convictions solely to those cases where prejudice may be presumed to exist, for such an approach respects and preserves the presumption of regularity that attends final judgments. Allowing broad-based constitutional attacks on final state judgments in federal sentencing proceedings would implicate accepted principles of comity and federalism, and undermine the integrity of state procedures.

In addition, the Fourth Circuit's limited review accords proper deference to the constitutional principles of the Full Faith and Credit Clause. Absent statutory waiver, which is not present here, or a waiver that is constitutionally required in order to protect the reliability of the federal sentencing process, a final state court judgment should be respected by a federal court exactly because it is "final."

Allowing full-scale challenges to state convictions merely because a constitutional allegation has been made would impose significant practical burdens on the States. States, at best, will be required to provide documentation or witnesses to support such convictions, which will often be difficult to identify and obtain because of the passage of time. At worst, the state will be required to defend collateral litigation, much of which may be frivolous, that will be engendered by a facile reopening of final state convictions in federal sentencing proceedings. In the process, the notion that a trial — rather than endless collateral review — is the main event in our criminal justice system would be further and unjustifiably diminished.

ARGUMENT

I. LIMITING CONSTITUTIONAL CHALLENGES TO PREDICATE STATE CONVICTIONS IN FEDERAL SENTENCING PROCEEDINGS TO CASES IN WHICH "PREJUDICE" MAY BE PRESUMED FROM THE ALLEGED CONSTITUTIONAL VIOLATIONS PROPERLY BALANCES THE DEFENDANT'S INTEREST IN RELIABLE SENTENCING WITH THE STATE'S INTEREST IN THE FINALITY OF ITS JUDGMENTS.

In *Wisconsin v. Mitchell*, ____ U.S. ____, 113 S.Ct. 2194 (1993), this Court reiterated that a sentencing court may take a large variety of factors into account in determining an appropriate sentence. The question in this case is whether the Constitution requires a federal sentencing judge to hold a hearing on all alleged constitutional challenges to a final state court conviction before the judge may consider such conviction in imposing the sentence. Obviously, the Congress, as it has

done in other contexts, *see, e.g.*, 21 U.S.C. §851, could impose such a limitation as a matter of statutory law. However, Congress has not enacted any language that would command such a result under the Armed Career Criminal Act, 18 U.S.C. §924(e). Thus, any limitation on the power of a federal sentencing judge to consider a predicate state offense for sentencing purposes — without first holding a hearing on any alleged constitutional challenge to that conviction — derives, if at all, from the Constitution itself. The Constitution does not require, as a *per se* rule, that final state convictions may not be considered in federal sentencing simply because any "constitutional challenge" is being asserted to that state conviction.

In *Burgett v. Texas*, 389 U.S. 109 (1967), this Court held that during recidivist proceedings, the admission of a prior criminal conviction which was constitutionally infirm under the standards of *Gideon v. Wainwright*, 372 U.S. 445 (1963), denied the defendant his constitutionally protected right to a fair trial. And, in *United States v. Tucker*, 404 U.S. 443 (1972), this Court reaffirmed that "[t]o permit a conviction obtained in violation of *Gideon v. Wainwright* to be used against a person either to support guilt or enhance punishment for another offense . . . is to erode the principle of that case." *Tucker*, 404 U.S. at 449 (*quoting Burgett v. Texas*, 389 U.S. at 114). In both cases, this Court identified the interests at stake as the fundamental unreliability of a completely uncounseled conviction for sentencing purposes. The subsequent conviction or sentence in each case depended upon the reliability of a past uncounseled conviction. *See Lewis v. United States*, 445 U.S. 55, 57 (1980). In sentencing terms, the conviction could not be relevant or material to proper sentencing, since on its face it did not necessarily establish guilt. *See Spencer v. Texas*, 385 U.S. 554 (1967). The total denial of counsel was held to implicate and impeach "the very integrity of the fact finding process." *Linkletter v. Walker*, 381 U.S. 61 (1965).

It certainly does not follow, however, that all alleged constitutional violations have the same effect on the reliability of a predicate state conviction. This Court has noted on many occasions that convictions may be overturned on Fourth Amendment grounds for reasons that are wholly extraneous

even to whether the evidence excluded was probative, much less to whether the guilt of the defendant has been undermined. *Stone v. Powell*, 428 U.S. 465 (1976) (barring habeas review of alleged violations of the Fourth Amendment where the defendant had a "full and fair" hearing in state court). In *Lewis v. United States, supra*, the Court even approved an uncounseled conviction as a predicate for a subsequent conviction for possession of a firearm by a convicted felon. Indeed, the Court held that there was a rational connection between any prior conviction and the potential dangerousness of the defendant.

In the present case, the district court declined to consider Custis' challenge to the constitutional validity of his predicate state convictions. Custis claimed that one predicate conviction for burglary was obtained as a result of unconstitutionally ineffective assistance of counsel and that another conviction for attempted breaking and entering was obtained as a result of a constitutionally defective guilty plea.

In affirming the decision of the district court not to entertain challenges to the predicate convictions in this case, the court of appeals distinguished the *Gideon* violations at issue in *Burgett* and *Tucker* from the violations alleged by Custis. Unlike uncounseled convictions, which, on their face, presumptively affect the reliability of the guilt-determining process, the claims made by Custis do not, *per se*, call into question the defendant's guilt. *United States v. Custis*, 988 F.2d 1355, 1361 (4th Cir. 1993).

A claim of ineffective assistance of counsel, if shown, is a constitutional violation. Yet it does not, by mere allegation, presumptively affect the reliability of a state conviction. *Cf. Kimmelman v. Morrison*, 477 U.S. 365, 390-91 (1986). In such a case, a finding of guilt will be overturned only after a fact-intensive hearing, in which counsel's performance is judged against the standard of whether the outcome would have been materially altered. *Strickland v. Washington*, 466 U.S. 668 (1984). And a guilty plea — which is a direct admission of guilt — will be presumed proper upon collateral review, and will be reversed, again, only after a fact-intensive showing by the defendant that prejudice exists under the circumstances.

Parke v. Raley, ____ U.S. ____, 113 S.Ct. 517 (1992). When a guilty plea is at issue, "the concern with finality . . . has special force." *United States v. Timmreck*, 441 U.S. 780 (1979). This is so because a "counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it quite validly removes the issue of factual guilt from the case." *Menna v. New York*, 423 U.S. 61, 62 n.2 (1975); *Marshall v. Lonberger*, 459 U.S. 422 (1988).

Accordingly, the court of appeals held that "district courts are obliged to hear constitutional challenges to predicate state convictions in federal sentencing proceedings only when prejudice can be presumed from the alleged constitutional violation, regardless of the facts of the particular case; and when the right asserted is so fundamental that its violation would undercut confidence in the guilt of the defendant." *Id.* at 1362. *See also United States v. Bradshaw*, 999 F.2d 798 (4th Cir. 1993), *petition for cert. filed Oct. 21, 1993* (No. 93-6448), wherein the Court of Appeals for the Fourth Circuit elaborated on its test:

> . . . a district court must consider (1) whether prejudice can be "presumed" from the alleged constitutional violation regardless of the facts *and,* conjunctively, (2) whether the right asserted is "so fundamental" that its violation would undermine the court's confidence in the defendant's guilt. In conducting this two-part inquiry, district courts cannot "presume prejudice" beyond the four categories of error that *Rose* lists as "necessarily render[ing] a trial unfair." 478 U.S. at 577, 106 S.Ct. at 3106. Within the *Rose* categories, district courts may further restrict collateral challenges to those fundamental errors that have not been subjected to harmless-error analysis by the Supreme Court or the published views of this tribunal.

Id. at 800.

The holding of the court of appeals in this case properly balances the fundamental right of an accused to reliable

sentencing and the State's important interests in the finality of its judgments. Allowing a criminal defendant to attack predicate state convictions beyond the present holding of the court of appeals would adversely affect interests of comity and federalism and is destructive of both the presumption of regularity of state judgments and the finality of state convictions.

It is a well-settled principle of law that the judgment of a court of competent jurisdiction is presumed to be proper until the contrary appears. *Parke v. Raley, supra; Johnson v. Zerbst*, 304 U.S. 458 (1938). When a defendant's "chance to appeal has been waived or exhausted, . . . [a court is] entitled to presume he stands fairly and finally convicted." *United States v. Frady*, 456 U.S. 152, 164 (1982).

This Court has repeatedly recognized the interests of comity and federalism that underlie our dual federal-state judicial systems. *See, e.g., Engle v. Isaac*, 456 U.S. 107 (1982). Review of a final state court conviction by the federal system necessarily implicates those interests. As the Court has stated, "inroads on the principle of finality tend to undermine confidence in the integrity of our procedures." *Addonizo v. United States*, 442 U.S. 178, 184-85 (1979).

Even in federal habeas corpus proceedings, where a collateral challenge to a state conviction is allowed, this Court has given consideration to the societal costs of such review. For example, before a state court conviction can be challenged on application for a federal writ of habeas corpus, the defendant must have exhausted his remedies in state court. *Castille v. Peoples*, 489 U.S. 346 (1989). As this Court has emphasized, it "would be unseemly in our dual system of government for the federal courts to upset a state-court conviction without affording the state courts the opportunity to correct a constitutional violation." *Duckworth v. Serrano*, 454 U.S. 1, 4 (1981).

Similarly, a habeas corpus petitioner who cannot present his constitutional challenge in state court, because of a procedural default, will be deemed to have waived it for federal habeas corpus purposes except in a few limited circumstances. Indeed, unless the petitioner can demonstrate cause for the procedural

default and actual prejudice resulting from the alleged constitutional error, or that failure to consider the claim will result in a fundamental miscarraige of justice, no federal review will be permitted at all. *Coleman v. Thompson,* 501 U.S. ____ , 112 S.Ct. 1845 (1992); *Murray v. Carrier,* 477 U.S. 478 (1986).

Collateral challenges to predicate state convictions during federal sentencing proceedings would undermine the interests of comity, federalism, and finality even more so than in habeas corpus review. The district court may be hearing challenges to state court judgments that are final because such convictions have never been challenged. Even if a challenge has been raised at all, the constitutional claims may never have been presented. If a constitutional doctrine of "reliable sentencing" would require a hearing on any asserted constitutional claim, then the federal sentencing court would undertake review of state convictions unfettered by these limitations. The traditional legal doctrines of finality of judgments, exhaustion of remedies, and waiver and default, which have been carefully and painstakingly devised to protect the State's interests in collateral review, may be utterly ignored. In contrast, the Fourth Circuit's holdings in this case and in *Bradshaw, supra,* respect and preserve these doctrines and make appropriate accommodation to the rights of the accused. The Court is urged to preserve that balance by affirming the court of appeals here.

II. LIMITING CONSTITUTIONAL CHALLENGES TO PREDICATE STATE CONVICTIONS IN FEDERAL SENTENCING PROCEEDINGS TO CASES IN WHICH "PREJUDICE" MAY BE PRESUMED FROM THE ALLEGED CONSTITUTIONAL VIOLATIONS ACCORDS PROPER "FULL FAITH AND CREDIT" TO STATE CONVICTIONS.

28 U.S.C. §1738 sets forth in pertinent part:

> Such Acts, records, and judicial proceedings [of any state] or copies thereof, so authenticated shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the court of such State, Territory or Possession from which they are taken.

In addition to properly balancing the State's interest in the finality and presumption of regularity of its proceedings, the Fourth Circuit's standard for collateral review of a predicate state conviction in federal sentencing proceedings also accords proper deference to the overarching commands of "full faith and credit."

The Full Faith and Credit Clause of the United States Constitution, as implemented by 28 U.S.C. §1738, mandates that the judicial proceedings of a state court be accorded the same full faith and credit in the federal court that they enjoy by law or usage in the courts of the state from which they are taken. *See, e.g., Migra v. Warren City School Dist. Bd. of Educ.,* 465 U.S. 75 (1984); *Allen v. McMurry,* 449 U.S. 90 (1980). Since a final judgment of conviction generally would be accorded respect and a strong presumption of regularity in a state court, the Full Faith and Credit Clause commands that it be accorded the same status in federal sentencing proceedings.

There may, of course, be exceptions to this rule. Exercising its discretion, Congress has limited the effect of 28 U.S.C. §1738 by authorizing collateral attacks on prior state convictions in certain circumstances. *See, e.g.,* 28 U.S.C. §2254 (federal habeas corpus proceedings); 21 U.S.C. §851 (sentence enhancement for certain drug offenses). However, a partial repeal of the Full Faith and Credit Statute cannot be inferred, but must be clearly and manifestly found in a coordinate federal statute. *Krener v. Chemical Const. Corp.,* 456 U.S. 461 (1982).

As pointed out previously, the Armed Career Criminal Act, 18 U.S.C. §924(e), contains no statement of congressional intent that the Full Faith and Credit Statute is to be ignored. *United States v. Jones,* 907 F.2d 456 (4th Cir. 1990), *cert. denied,* 498 U.S. 1029 (1991).

Nor do the federal sentencing guidelines contain any clear statement of congressional intent that a final judgment of a state court may be collaterally attacked and invalidated for the

purpose of sentencing. *United States v. McGlocklin,* No. 91-1621, ____ F.3d ____ (6th Cir. Sept. 17, 1993), WL 356406 (*en banc*). Thus, again, if any exception is to be made here to the governing principles of "Full Faith and Credit," it must arise from the Constitution itself, or not at all. Except where constitutional requirements for due process are implicated, state court judgments are entitled to "full," *i.e.,* complete, faith and credit pursuant to the Constitution and 28 U.S.C. §1738. *See Davis v. Davis,* 305 U.S. 32 (1938). But due process does not itself require a full hearing on any alleged constitutional challenge to a predicate state conviction in a federal sentencing proceeding. Instead, a trial sentencer may take into account a judgment of conviction of a state court which has become final because it has never been directly challenged on the grounds now belatedly asserted in the collateral federal proceeding.

It is sophistry to argue that, when a federal court holds a final state judgment to be invalid for the purposes of federal sentencing proceedings, a denial of full faith and credit is not implicated because the effect of the federal court's action is limited to that proceeding only. In *United States v. Jones,* 907 F.2d at 479, 483, Judge Wilkinson cogently stated in dissent:

> Federal court invalidation of a state conviction — even if it lacks collateral legal consequences within the state — constitutes a major affront to the integrity of the state's judicial process.
>
> * * *
>
> State convictions are either valid or they are invalid. They are not valid for some purposes, but invalid for others. They are not valid in the eyes of the state judiciary, but invalid in the eyes of the federal system.

The Fourth Circuit's standard herein gives proper deference to the requirement of full faith and credit by requiring invalidation of a predicate state conviction only when necessary to protect the reliability of the federal sentencing process. Since challenges to predicate state convictions which do not allege presumptively prejudicial constitutional errors do not, on their face, implicate

that reliability, no full hearing on all such claims is constitutionally required.

III. LIMITING CONSTITUTIONAL CHALLENGES TO PREDICATE STATE CONVICTIONS IN FEDERAL SENTENCING PROCEEDINGS TO CASES IN WHICH "PREJUDICE" MAY BE PRESUMED FROM THE ALLEGED CONSTITUTIONAL VIOLATIONS PROPERLY MINIMIZES INCREASED BURDENS ON THE STATE THAT OTHERWISE WOULD EXIST TO SUPPORT THE VALIDITY OF ITS CONVICTIONS.

In the case below, the United States Court of Appeals for the Fourth Circuit joined other circuits in assuming that the States have no interest regarding the issue of review of predicate state convictions during federal sentencing proceedings. *See, e.g., United States v. Paleo,* 967 F.2d 7, 12 (1st Cir. 1992); *United States v. Jones,* 907 F.2d at 468-69. Nonetheless, such courts have, in part, justified limitations on the review of state convictions because of the obvious time and resource burdens thereby imposed on federal prosecutors. Contrary to the views expressed by these courts, amici States do have an integral interest in upholding the validity of their state convictions. And to the extent the defense of this integral interest is made to burden the States, as a practical matter, with additional demands on their sovereign resources, it magnifies the ultimate cost to our judicial system from authorizing such challenges.

The decisions cited above imply that state prosecutors will not assist federal prosecutors in defending state convictions against collateral attack, simply because the state convictions are not directly at issue in federal sentencing proceedings. *United States v. Paleo,* 967 F.2d at 12. Even were that otherwise true, the federal prosecutors inevitably will turn to the state prosecutors for assistance in locating transcripts, witnesses, and other evidence, as well as for background information and advice about the legal arguments raised. More to the point, however, as a simple matter of comity, most state prosecutors will cooperate with and even directly assist their federal counterparts.

Of necessity, this activity will impose new demands upon the limited time and resources available to state prosecutors. Challenges to prior state convictions in federal sentencing hearings almost invariably will occur long after the state trial, conviction, and even appeal have taken place. Thus, they are remote in time. Review, therefore, is severely hampered by the "erosion of memory" and "dispersion of witnesses" that occur when such a length of time has passed. *Kuhlmann v. Wilson,* 477 U.S. 436, 453 (1986). Indeed, if there is to be no exhaustion requirement in such reviews, comparable to those fastidiously observed in federal habeas corpus proceedings, then review of an old conviction may become nearly impossible, due to the absence of "a complete factual record to aid the federal courts in their review." *Rose v. Lundy,* 455 U.S. 509, 519 (1982).

Inevitably, as in habeas corpus proceedings, the federal court must seek documentation or other evidence to support a state conviction that has been called into question in a federal sentencing hearing. The burden of providing this documentation can be increased immeasurably if the prior conviction was never reviewed in the state courts on direct appeal or in state post-conviction relief, because the necessary records may not exist at all in such a case. The sentencing hearing would thus require the state prosecutor, if possible, to duplicate or even recreate a case once thought to be closed.

Moreover, it is not true that a state will not be adversely affected by a decision in a federal sentencing proceeding that a state conviction is invalid. While there may be no direct release from prison as in a habeas corpus action, a decision holding a state conviction invalid could and surely would be utilized by an inmate or former inmate as a predicate for a new habeas corpus challenge, a challenge to a parole revocation based on the conviction, a civil rights action, a request for expungement, or, in states like Ohio with such a statute, a request for money damages for "wrongful imprisonment." *See* Ohio Revised Code §2743.48. Not only will state attorneys be required to handle these cases, and state courts to try them, but a successful suit would result in monetary damages payable by the State, all traceable to the initial collateral attack in the federal sentencing proceeding.

The Court is aware that some portion of inmate litigation can be routinely labelled as "frivolous." Former state defendants may utilize a favorable decision in federal sentencing in ways that cannot even be foreseen, despite limited chances of success. Even if these attempts would fail, they will predictably result in additional time and money being spent by the State in order to have them dismissed.

Finally, it is simply not true that the State has no interest in the integrity of its convictions, even if there would be no immediate practical ramifications for the State in a particular instance. As this Court has noted, a state trial is to be respected and treated as the "'main event' and not a 'tryout on the road' for what will later be the determinative federal . . .hearing." *Wainwright v. Sykes,* 433 U.S. 72, 90 (1977); *Engle v. Isaac, supra.* Aside from general interests of finality and of full faith and credit, a state prosecutor, who has marshalled and expended considerable time and resources, cannot be expected lightly to stand by to see that conviction held for naught. Allowing such challenges would impose significant practical costs on the States, and would present yet another unwelcome and unnecessary diversion from the state trial as the "main event" in the criminal justice process.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Brief of Respondent, this Court should affirm the decision of the Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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